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CASE NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JACK R. WHITEHORN and
MARY RUTH WHITEHORN,

Petitioners,

vs.

MARGARET H. MURPHY,
SMITH, GAMBRELL & RUSSELL
and ROBERT M. GARSTIN,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Ninth Circuit appropriately affirmed the District Court's Order dismissing the action brought by Petitioners Whitehorn on the basis of *res judicata.*

II. Whether the United States Court of Appeals for the Ninth Circuit appropriately affirmed the District Court's Order dismissing the action brought by Petitioners Whitehorn on the basis of improper service of process on the Respondents.

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IN THE SUPREME COURT OF THE UNITED STATES

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CASE NO.

DECISION BELOW

The August 21, 1990 decision of the United States Court of Appeals for the Ninth Circuit in Case No. 88-0541 affirming the decision of the District Court is unreported. The June 6, 1989 decision of the United States District Court for the District of Nevada dismissing the action by petitioners is unreported. The May 26, 1988 decision of the United States Court of Appeals for the Eleventh Circuit in Case No. 88-8018 affirming the decision of the District Court for the Northern District of Georgia is unreported. The December 21, 1987 decision of the United States District Court for the Northern District of Georgia affirming the order of the Bankruptcy Court is unreported.

STATUTORY PROVISIONS INVOLVED

This case involves 11 U.S.C. § 1141:

Effect of Confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such

creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1)Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan -

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h) or 502(i) of this title, whether or not -

(i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if -

(A) The plan provides for the liquidation of all or substantially all of the property of the estate;

(B) The debtor does not engage in business after consummation of the plan; and

(C) The debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

This case also involves 11 U.S.C. § 1109:

Right to be Heard

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

STATEMENT OF THE CASE

This case is best summarized by the statement in the Order of the United States District Court for the Northern District of Georgia in the earlier related action that Petitioners' claims have been "litigated to at least four separate conclusions in ten different proceedings in bankruptcy, district and appellate courts in Nevada and Georgia." District Court Order, Petitioners' Appendix, p. 15. Every court that has been confronted by the flood of claims raised by Petitioners

subsequent to the bankruptcy proceedings detailed below has agreed that all of Petitioners' claims were fully and finally litigated or should have been raised in the earlier proceedings and therefore that Petitioners' latest action is barred by the doctrine of *res judicata*. There exists absolutely no basis for this Court to decide differently.

Jack R. Whitehorn and Mary Ruth Whitehorn ("Petitioners") filed a Complaint on July 1, 1989 in the United States District Court for the District Of Nevada (the "Complaint"). The Complaint seeks damages allegedly caused to Petitioners by Margaret H. Murphy, Esq., the law firm of Smith, Gambrell & Russell,[1] Robert M. Garstin and William T. Burke[2] arising out of the handling of the bankruptcy of WFDR, Inc. ("WFDR") by Respondents. Respondents filed a Motion to Dismiss and a Motion for Judgment on the Pleadings or for Summary Judgment. On April 24, 1989, the District Court granted Respondents' Motion for Judgment on the Pleadings and Summary Judgment, finding that the Petitioners had already fully litigated their claims or should have raised the claims brought in Nevada in the bankruptcy action that had been fully and finally litigated in Georgia. Therefore, the action was barred by the doctrine of *res judicata*. In addition, that Order granted Respondents' Motion to Dismiss for insufficient service of process.

By Order dated August 21, 1980, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision on the same grounds as stated in that decision. The Court of Appeals reiterated that *res judicata* bars the Whitehorns' Complaint and that the Whitehorns improperly served the Respondents. In addition, the Court of

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[1] Hereinafter Margaret H. Murphy, Esq. and Smith, Gambrell & Russell will be referred to individually as "Murphy" and "SG&R" and collectively as "Respondents." Respondents acted as counsel to WFDR in its bankruptcy case and related proceedings.

[2] Robert M. Garstin was president of WFDR during its bankruptcy proceedings and William T. Burke was counsel for Dr. John Whitehorn in the WFDR bankruptcy proceedings. Burke was dismissed for lack of personal jurisdiction.

Appeals found that the appeal was frivolous and warned the Whitehorns that any further litigation regarding the sale of WFDR would result in sanctions.

The facts preceding the filing of the Complaint are not in dispute, the Bankruptcy Court in the Northern District of Georgia having resolved these matters on cross-motions for summary judgment.[3]

On March 28, 1980, Petitioner Jack Whitehorn executed a Stock Option Agreement in favor of his brother, Dr. John Whitehorn (hereinafter the "Stock Option Agreement"). The Stock Option Agreement included a proxy granting voting authority over Petitioners' 100% stock interest in WFDR, and an option to acquire Petitioners' stock in WFDR.

On May 9, 1980, WFDR filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code, case no. 80-00936N, in the United States Bankruptcy Court for the Northern District of Georgia. After unsuccessfully challenging various aspects of the WFDR Chapter 11 proceeding, Petitioners filed a voluntary individual petition under Chapter 11 in Nevada on October 6, 1980.

On July 22, 1980, in the Northern District of Georgia, and on December 11, 1980, in the District of Nevada, Petitioners initiated adversary proceedings against Dr. John Whitehorn contesting ownership of the stock and control of WFDR. On January 30, 1981, the Nevada court transferred the Nevada adversary proceeding to the Northern District of Georgia for consolidation.

On January 30, 1981, WFDR filed an application to liquidate its assets in the United States Bankruptcy Court for the Northern District of Georgia. Petitioners objected to the application both as alleged creditors of WFDR and claiming sole ownership of WFDR. Following notice and a hearing, the

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[3] The following account is based on the Order of the United States Bankruptcy Court for the Northern District of Georgia, Case No. BK-LV-80-00936N, Adversary No. 87-0002N, dated July 31, 1987 (Petitioners' Appendix at 36).

bankruptcy court entered an order on March 16, 1981, approving the sale of assets for $790,000.00 to Lake George Corporation, predecessor in interest to Provident Broadcasting Company (hereinafter "Provident"). On April 8, 1981, the bankruptcy court denied Petitioners' motions for a new trial, for alteration or amendment of the judgment and for additional findings of fact. Petitioners appealed both orders (hereinafter collectively the "Orders Approving the Sale of Assets"), but did not seek a stay of the sale pending resolution of the appeal.

On May 27, 1981, WFDR filed an Amended Plan of Reorganization (hereinafter the "Amended Plan") which upon confirmation would implement the Orders Approving the Sale of Assets by canceling the outstanding stock of WFDR. Holders of stock, including Petitioners, would receive certificates of interest evidencing entitlement to the net proceeds of the liquidation, after payment of debts and claims owing by WFDR.

Petitioners filed objections to the disclosure statement and to confirmation of the Amended Plan on the grounds, inter alia, that the management of WFDR lacked the requisite corporate authority to file the Chapter 11 petition. On June 29, 1981, the bankruptcy court entered an order confirming the Amended Plan over Petitioners' objections. In the order confirming the Amended Plan, the bankruptcy court acknowledged the pending adversary proceeding between Petitioners and John Whitehorn concerning the ownership of WFDR, but stated that even if "Jack Whitehorn is proven to be the owner of all the stock of WFDR, Inc., despite his objection to the plan of reorganization, the plan should be confirmed pursuant to 11 U.S.C. 1129(b)(2)(C)." No appeal was filed from the order confirming the Amended Plan. The Amended Plan was thereafter fully consummated.

By order dated September 18, 1981, the United States District Court for the Northern District of Georgia dismissed Petitioners' appeal of the Orders Approving the Sale of Assets as moot "in that the amended plan providing for the sale of the stock in lieu of a sale of the assets has been approved and

consummated." The district court also noted that the order approving the sale of stock had not been appealed and no stay of the sale had been obtained. On August 17, 1983, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's order dismissing Petitioners' appeal as moot because the order confirming the Amended Plan had not been appealed and because the sale authorized and implemented by the Amended Plan was not stayed.

On July 14, 1983, Respondents and the Committee of Unsecured Creditors of WFDR jointly filed an application to settle certain claims against the WFDR estate. The application provided, among other things, that upon partial payment of certain administrative and unsecured claims of Dr. John Whitehorn, Dr. John Whitehorn would relinquish any claim to proceeds of the shares of WFDR cancelled pursuant to the provisions of the Amended Plan. The application further provided that Petitioners' ownership interest in WFDR, evidenced by the newly issued certificates of interest tendered in exchange for the cancelled shares, was to be redeemed by the payment of $35,000 from the proceeds generated subsequent to the sale to Provident.

On January 26, 1984, the Bankruptcy Court approved the settlement in recognition and satisfaction of Petitioners' interest in WFDR. Proceeds from the liquidation were paid to Petitioners' attorneys for the benefit of Petitioners' individual estate upon specific authorization by order of the United States Bankruptcy Court for the District of Nevada. On November 15, 1984, a final decree was entered closing the estate of WFDR.

On April 3, 1986, Petitioners filed a "Complaint to Compel Turnover of Property" in the Bankruptcy Court for the District of Nevada. The action was transferred to the United States Bankruptcy Court for the Northern District of Georgia. In that action, Petitioners essentially asked the court to avoid the earlier transfer of the WFDR stock to Provident.

By Order dated July 31, 1987, the Bankruptcy Court entered summary judgment against the Petitioners, finding

that the WFDR stock was not affected by the automatic stay in the individual bankruptcy action in Nevada and that all of the claims raised in the action had been addressed previously or would have been addressed if raised. The court therefore found that the Complaint was barred by the doctrine of *res judicata.*

On appeal, the United States District Court for the Northern District of Georgia affirmed the Bankruptcy Court's decision by Order dated December 21, 1987. The Eleventh Circuit affirmed the District Court ruling and, after concluding that the appeal was frivolous, awarded double costs against Petitioners. Rehearing was denied.

Petitioners then sought a writ of certiorari from this Court. That petition was denied by Order dated February 21, 1989.

On July 1, 1988, while the petition for rehearing by the Eleventh Circuit was pending, Petitioners filed a complaint in the United States District Court for the District of Nevada seeking damages for fraud, conspiracy and racketeering activity allegedly arising out of the handling of the WFDR bankruptcy action by Respondents. Specifically, Petitioners alleged that they were damaged as a result of the deprivation of stock and assets, including FCC licenses, sold as a result of the WFDR bankruptcy.

Petitioners attempted service on Smith, Gambrell & Russell and Margaret H. Murphy by sending a copy of the Summons and Complaint by certified mail to Smith, Gambrell & Russell's office in Atlanta. No Form 18-A acknowledgement of service and no stamped return envelope was provided as required by Rule 4 of the Federal Rules of Civil Procedure.

By Order dated June 5, 1989, the United States District Court for the District of Nevada entered a detailed order finding that the same claims had been fully litigated in more than one action. District Court Order, Petitioners' Appendix, p. 15. The District Court dismissed the Complaint on the

basis that the claims were barred by the doctrine of *res judicata* and that service was improper under Rule 4 of the Federal Rules of Civil Procedure.

Petitioners appealed the decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the decision of the District Court, adopting the District Court's decision and adding that the action was frivolous and that further proceedings on the same claims would be sanctioned. *See* Order dated August 21, 1990, Petitioners' Appendix, p.2.

SUMMARY OF THE ARGUMENT

The Amended Plan, having been confirmed and consummated, is *res judicata* as to all issues raised by Petitioners in the instant Petition. In addition, the various actions in Georgia and Nevada are full and final decisions and are therefore *res judicata* as to Petitioner's claims. All claims raised in Petitioner's Complaint should have been raised at the confirmation hearing on the WFDR plan of reorganization or in the original action in the Georgia court and cannot be used as a collateral attack on the Amended Plan.

Even if *res judicata* were inapplicable to this action, dismissal was proper because neither Murphy nor Smith, Gambrell & Russell was properly served. The Summons and Complaint were sent certified rather than first class mail, no return envelope was enclosed and no Form 18-A was furnished. In addition, service was attempted on Murphy by sending the Summons and Complaint to her former employer, Smith, Gambrell & Russell. Murphy had long since been appointed a Judge of the United States Bankruptcy Court for the Northern District of Georgia. Therefore, service was improper.

REASONS FOR DENYING THE WRIT

The Petition follows the determination by the Court of Appeals that the appeal to that court was frivolous. Consistent with that finding, Petitioners have failed to establish a reason for granting the Writ. The Petition for Writ of Certiorari is incomprehensible. Respondents are unable to glean any relevant argument from the Petition. Petitioners did not directly address either the question of whether *res judicata* applies or whether service was proper. Therefore, Respondents will attempt to address the issues actually before this Court on Petition for a Writ of Certiorari.

The decision below is consistent with decisions of other federal courts of appeals and the accepted and usual course of judicial proceedings. This case does not involve an important question of federal law which should be settled by this Court, and the decision below is in harmony with the applicable decisions of this Court. Moreover, the facts and procedural background of this case are so unique as to eliminate any significant precedential value of a review on the merits by this Court.

A. The Courts Below Correctly Applied Settled Law in Holding That the Complaint Is Barred By the Doctrine of *Res Judicata*.

All of the relevant claims and issues raised by the Complaint were previously addressed (or would have been addressed if raised) by the bankruptcy court in the WFDR bankruptcy case through the confirmation of the Amended Plan. In addition, the same or related claims were raised in the proceedings before the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit. Those courts have already determined that the decision of the Bankruptcy Court precludes any further litigation of issues arising out of the bankruptcy proceedings. This Court denied certiorari in that action on February 21, 1989. The effect of the automatic stay in Petitioners' individual bankruptcy action on the WFDR reorganization should have been litigated nine years ago, if at

all. The defense, even if meritorious, is now barred and superseded by the confirmation and consummation of the Amended Plan. Although Petitioners, who at the time were represented by counsel, objected to confirmation of the Amended Plan, they failed to raise the issue of the automatic stay. Moreover, Petitioners did not appeal the confirmation order.

Confirmed plans of reorganization have a binding *res judicata* effect on all parties.

> [T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan and any creditor, equity security holder, or general partner in the debtor whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. § 1141(a). All issues raised and all issues that could have been pled in objection to confirmation of the Amended Plan are *res judicata* and cannot now be asserted as a collateral attack on the Amended Plan. *See Southmark Properties v. Charles House Corporation*, 742 F.2d 862 (5th Cir. 1984). *See also* 5 Collier on Bankruptcy § 1141.01[1] (15th ed. 1987). *Res judicata* not only bars claims that actually were litigated in a previous proceeding, but reaches beyond the scope of collateral estoppel and bars litigation of claims that *could have been* litigated in the previous action. *Hotel Corp. of the South v. Rampart 920, Inc.*, 46 Bankr. 758, 767 (E.D. La. 1985), *aff'd*, 781 F.2d 901 (5th Cir. 1986). All of the issues raised by Petitioners, including the effect of the automatic stay, should have and could have been raised and litigated as objections to the Amended Plan.

The *Southmark Properties* decision is particularly apposite. In *Southmark Properties*, the United States Court of Appeals for the Fifth Circuit applied the doctrine of *res judicata* to a factual circumstance substantially similar to that of

the instant proceeding and barred relitigation of all issues that could have been raised as objections to confirmation. In *Southmark Properties,* the president and majority shareholder of the debtor corporation objected to the plan of reorganization. The objections were overruled by the bankruptcy court, but were subsequently renewed, albeit in recharacterized form, in a collateral attack on the confirmation order. The Fifth Circuit Court of Appeals held that the order confirming the sale and transfer of title of the property to Southmark were *res judicata.*

> For a prior judgment to bar an action on the basis of *res judicata,* the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases [citations omitted]. . . .

742 F.2d 862, 869. *In Southmark Properties,* the Court found that the plaintiff was actively involved in the bankruptcy proceedings and therefore become a party to them, or at least was in privity with the parties.

Similar to the plaintiff in *Southmark Properties,* Petitioners were a "party in interest" to the WFDR reorganization proceeding and are bound, as are all other parties in interest, by the terms and conditions of the Amended Plan. As an equity security holder in WFDR, petitioners were a party in interest to the confirmation proceedings by definition under 11 U.S.C. § 1109.

In addition, Petitioners filed proceedings in the district and bankruptcy courts in Georgia seeking the turnover of assets from the bankruptcy estate. Any claims of alleged damages arising from the Respondents' handling of the WFDR bankruptcy proceedings could and should have been raised in the Georgia action. In the earlier proceedings in Georgia, the Bankruptcy Court specifically determined that the actions taken in the WFDR bankruptcy action did not violate the automatic stay of the individual bankruptcy. The Court

found that Jack Whitehorn had received the benefit of stock ownership when, upon the sale of WFDR, Whitehorn was paid (through his attorneys) $35,000.[4]

The Court went on to find that, regardless of the fact that Petitioner had received value for his stock, the "court had jurisdiction as a result of WFDR's filing to issue orders approving the sale of assets or the cancellation of stock even if an individuals' stockholder's own bankruptcy case was pending in another jurisdiction." *Jack R. Whitehorn and Mary Ruth Whitehorn v. Smith, Gambrell & Russell and Margaret H. Murphy,* Adversary No. 87-002N (Bankr. N.D. Ga., July 31, 1987) (Petitioner's Appendix, p. 36), *aff'd,* No. C87-103N (N.D. Ga. December 21, 1987), *aff'd* 849 F.2d 1479 (11th Cir. 1988), *reh'g denied,* 854 F.2d 1326, cert. denied, ____ U.S. ____, 109 S.Ct. 567, 102 L.Ed.2d 592 (1988). Therefore, the issue of whether the sale of assets violated the automatic stay has been litigated and determined and Petitioners are precluded from reasserting the same claims or alleging claims related to those decided in the Georgia action in the later Nevada action.

Petitioners should not be heard to complain at this date, nine years after confirmation of the Amended Plan, that their due process rights were, in some unarticulated and inestimable fashion, violated. Petitioners' mistaken assumption that the filing of the individual Chapter 11 proceeding automatically stayed consummation of the Amended Plan and made an appeal of the confirmation order unnecessary is perhaps unfortunate, but such neglect or ignorance of legal rights and responsibilities, particularly when Petitioners were represented by competent counsel, does not serve to annul or abrogate the binding *res judicata* effect of the Amended Plan.

This Court in *Stoll v. Gottlieb* held that even a plan of reorganization which erroneously discharged certain personal guaranties was, nonetheless, *res judicata* and stated:

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[4] As discussed previously, in a settlement approved by the Bankruptcy Court, Dr. John Whitehorn relinquished any claim to ownership of the WFDR stock in return for payment of certain disputed claims.

> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

305 U.S. 165, 172 (1938). The decision below is entirely consistent with the decisions of this Court and is based on settled law.

The only argument Petitioners make with regard to *res judicata* is that the Georgia courts did not re-try the issue of whether the FCC properly approved the sale of the licenses owned by WFDR. In its letter refusing to deny or defer transfer of control of the licenses from WFDR to Provident, the FCC specifically stated that the issue of ownership of the licenses and stock had already been determined by the Bankruptcy Court and that any remaining issues were legal issues rather than administrative issues. Appendix to Petition, pp. 64-67. Therefore, the issue of whether the FCC properly allowed the transfer of the licenses and other assets of WFDR was resolved in the Bankruptcy Court and in the related Georgia proceedings. No issue remains to be litigated or determined with regard to any aspect of the WFDR bankruptcy or any actions allegedly taken by Respondents in representing WFDR.

B. The Trial Court Properly Granted Respondents' Motion to Dismiss Pursuant to Rule 12(b)(5) Because Petitioners Failed to Serve Process on Respondents in a Proper Manner.

Petitioner does not address the issue of proper service except to say that, if service was improper, the Court need not have addressed the *res judicata* issue. A court is free to address any or all grounds raised as a basis for dismissal of an action. If Petitioners admit that service was improper, as it appears from their Petition, then the Petition should be deemed not to present any issue for hearing. Dismissal on the basis of improper service disposes of this case just as completely as does dismissal on the basis of *res judicata.*

In any event, the undisputed facts show that service was improper. Rule 4 of the Federal Rules of Civil Procedure provides that service on an individual shall be made

> Personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Rule 4(c)(2)(C) provides

> a summons and complaint may be served upon a defendant . . . -
>
> (ii) by mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgement conforming substantially to Form 18-A and a return envelope, postage prepaid, addressed to the sender.

In this case, the facts regarding Petitioners' attempt at service of process upon Murphy and SG&R are not in dispute. Service was attempted upon both Respondents by sending copies of the summons and complaint by certified mail to the offices of SG&R in Atlanta, Georgia on or about July 1, 1988. Judge

Murphy was no longer a partner in SG&R at that time, having assumed her duties as judge with the United States Bankruptcy Court for the Northern District of Georgia on October 19, 1987. No Form 18-A acknowledgement of service or stamped return envelope was served with the complaint and summons.

Service was improper because the summons and complaint were sent by certified mail rather than first class mail as required by Rule 4(c)(2)(C). *Haas v. Berrien County Sheriff's Department*, 658 F. Supp. 877, 880 (W.D. Mich. 1987). In addition, service was improper as to both Respondents because Petitioners failed to include with the summons and complaint a notice and acknowledgement conforming to Form 18-A and a stamped return envelope, as is required by Rule 4(c)(2)(C). *See, e.g., Norlock v. City of Garland*, 768 F.2d 654, 656-57 (5th Cir. 1985); *Quann v. Whitegate-Edgewater*, 112 F.R.D. 649, 652-54 (D. Md. 1986); *Madden v. Cleland*, 105 F.R.D. 520, 523 (N.D. Ga. 1985). Third, the attempted service does not satisfy subparagraph (C)(i) because neither Nevada nor Georgia law provides for service by certified mail. Nev. R. Civ. P. 4; O.C.G.A. § 9-11-4.

Finally, service was insufficient as to Judge Murphy for the additional reason that it was not proper under the requirements of Rule 4, Fed. R. Civ. P. Service upon Judge Murphy at her former office does not comply with the requirement that service be made to the individual's dwelling house or usual place of abode or upon an agent authorized by law to receive service on behalf of the individual. Fed. R. Civ. P. 4(c)(2)(C) and 4(d)(1). At the time of the attempted service, Judge Murphy had no affiliation with SG&R. Therefore, the law firm cannot be deemed to be her agent for purposes of service of process. *See, e.g., Roberts v. Bienert*, 183 Ga. App. 751, 360 S.E.2d 25 (1987) (service upon doctor at office of former partner not sufficient); *McKnight v. Webster*, 499 F. Supp. 420, 424 (E.D. Pa. 1980) (service upon police headquarters insufficient as to former police chief); *Granite Chemical Corp. v. Northeast Coal & Dock Corp.*, 249 F. Supp. 597,

598 (D. Me. 1966) (agency for service must exist at time of service).

At the trial court level, Petitioners argued that their service upon the Respondents complied with Bankruptcy Rule 7004, which allows service without an acknowledgement form accompanying the complaint in non-core bankruptcy proceedings. This case is not a bankruptcy proceeding, as was the case in *Windsor Communications Group, Inc. v. Grant*, 75 Bankr. 713 (E.D. Pa. 1985), cited by Petitioners in their brief before the Ninth Circuit. Therefore, the Federal Rules of Civil Procedure, not the Bankruptcy Rules, govern service in this action.

CONCLUSION

Because this action was properly dismissed on the basis of *res judicata* and on the basis that Respondents were never properly served with process in this action, the Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served directly the requisite number of copies of the foregoing Brief in Opposition on:

Jack L. Whitehorn and Mary Ruth Whitehorn
5141 Indian River Drive
Box 377
Las Vegas, Nevada 89103

Carmine J. Colucci
Colucci & Amador
629 S. Sixth Street
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by placing same in the United States Mail, first class postage prepaid, this day of December, 1990. I further certify that all parties required to be served have been served.

Robert W. Beynart